Supreme Court, U. S.
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In the Supreme Court of the United States

Term, 197
No 77-799

TONY AQUILINO, et al.*,
Petitioners

vs.

McGRAW-EDISON COMPANY, a Corporation, and TRUSTEES OF THE McGRAW-EDISON COMPANY PROFIT SHARING TRUST,
Respondents

PETITION FOR WRIT OF CERTIORARI

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*A complete list of Petitioners annexed as Appendix "C".

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IN THE SUPREME COURT OF THE UNITED STATES

———————

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vs.

McGRAW-EDISON COMPANY, a Corporation, and TRUSTEES OF THE McGRAW-EDISON COMPANY PROFIT SHARING TRUST,

Respondents

———————

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

———

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 15, 1977.

OPINIONS BELOW

The Opinion of the District Court for the Western District of Pennsylvania granting the Defendants' motion for summary judgment is printed in Appendix "A" attached hereto.

An opinion was not written by the Third Circuit Court of Appeals pursuant to its judgment affirming the decision of the District Court.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on September 15, 1977, and a copy thereof is appended to this petition as Appendix "B". The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Where a trust is created by an employer for its employees, can a majority of the employee-beneficiaries of the trust, upon a termination of the trust, bind an individual employee-beneficiary to a particular disposition of the trust assets?

STATUTES INVOLVED

The parties stipulated that:

> "20. The Profit Sharing Plan was, as of December 31, 1973, a qualified plan within the meaning of Section 401 (a) of the Internal Revenue Code and was intended by the Company and the Trustees to be administered accordingly. (Appendix "A", page 53a.)"

The validity of Section 401 (a) of the Internal Revenue Code may be involved from the standpoint that the Defendant, McGraw-Edison Company, took the benefit of a business deduction for the funds contributed to the Profit Sharing Trust and thereafter, February, 1974, reacquired the use of these assets to fund or pay for the Company's obligations under the new Pension Plan.

STATEMENT

The suits of the Plaintiffs arise as a result of the termination of the McGraw-Edison Company Profit Sharing Plan at the Power Systems Division in Canonsburg, Pennsylvania, and the conversion of the Profit Sharing Trust assets to the use of the McGraw-Edison Company (the Company) to fund and pay its new fixed benefit obligations under a Pension Plan agreed upon during the course of collective bargaining between the Company and the Union in early 1974.

Cross motions for summary judgment were presented to the District Court on an agreed upon statement of facts essentially as follows:

The McGraw-Edison Company Profit Sharing Plan (the Profit Sharing Plan) was created by the Company and instituted at the Power Systems Division (Plaintiffs' place of employment) beginning in 1953. The Profit Sharing Plan provided for an irrevocable trust into which the Company periodically contributed a certain percentage of its profits and in addition matched contributions made by employees if they chose to make them. The Plaintiffs herein, for the most part, did contribute their own money into the trust. Strict accounting of an individual employee's trust assets was maintained.

The trust was *not* created as the result of collective bargaining and was never the subject of collective bargaining from its inception until its demise in early 1974 from

which time no further contributions have been made by the Company into the trust.

On or about February 18, 1974, after unrelenting insistence by the Union for a fixed benefit retirement program, the Company offered, and a majority of the Union employees accepted, a pension of $8.00 for each year of service. The Company also offered an alternative for past service, namely $30.00 per share for each share of McGraw stock held in an individual's account plus the individual's own contributions with interest at five percent. A majority of the employees voted in favor of the aforesaid proposal. The Plaintiffs herein did not, objecting to the disposition of their trust assets and the failure to obtain their individual consent thereto.

Under the terms of the Profit Sharing Plan, the trust was irrevocable, however, the Company (the Settlor) could terminate or amend it:

> "Sec. 10—Amendment and Discontinuance
>
> The company may amend or discontinue the plan at any time upon written notice to the other employers, but no employer will benefit thereby, as provided in the trust agreement. Participants will be notified of any such amendment or discontinuance within a reasonable period of time thereafter."

Under the terms of the Profit Sharing Plan an individual's benefits became vested on a graded scale over a period of fifteen years of employment.

The Profit Sharing Plan was implemented by a document known as the "Profit Sharing Trust Agreement". Article VIII entitled "Distribution on Termination" provided in part:

"Upon termination of the plan as respects any employer, the trustees shall distribute to each participant employed by such employer his share in the trust fund in accordance with the terms of the plan, . . ."

REASONS FOR GRANTING THE WRIT

One of the issues decided in *Elgin J. & E. Ry. Co. vs. Burley,* 325 U.S. 711, 89 L.Ed. 1886 (1945), was that a union employee was not completely controlled or regulated by the collective bargaining agreement—he could acquire, during the course of his employment, rights and interests personal to himself and with respect to which he alone could render a decision. See *Elgin J. & E. Ry. Co. vs. Burley* at pgs. 1900-1905.

Just as the plaintiffs in *Elgin* considered their rights sufficiently personal to warrant proceeding through the courts to protect them, so too do the Plaintiffs in the instant suit, having watched their trusts grow in many cases for twenty years and having contributed a portion of their own paycheck into their trusts to obtain an additional matching contribution from the Company.

Of course, the feeling of the ten plaintiffs in *Elgin* or the present one hundred twenty-seven Plaintiffs does not decide the issue. The circumstances must warrant the application of the *Elgin* case—and they do.

As noted in *Elgin,* employee retirement programs can certainly be the subject of collective bargaining. On the other hand, an employee's retirement program need not necessarily originate as a result of collective bargaining or have the Union (in our case United Steel Workers of America) as a party thereto. Whereas in *Dwyer vs. Climatrol Industries, Inc.,* 403 F.Supp. 683 (E.D. Wisc. 1975), the

retirement program was instituted through collective bargaining and the union was a party, in our case the Union was not a party to the McGraw-Edison Company Profit Sharing Plan and the Plan did not originate as a result of collective bargaining. Even though the parties had stipulated to this latter fact, the District Court ignored the stipulation as well as perhaps the provision of the Plan providing that the Company could unilaterally terminate or amend the Plan and the Trust—hardly what one would expect to find in an agreement to which a union was a party.

To deny that the interests of the Plaintiffs in their trusts were not or had not reached the threshold of "personal" rather than "union" ignores at least four circumstances:

1. As beneficiaries of a trust, the Plaintiffs were beneficial or equitable owners thereof. The trust assets represented payments irrevocably made by the Company (the Settlor) to the Plaintiffs, with simply the enjoyment thereof postponed. In addition to Company payments into the trust, many employees contributed a portion of their own wages and garnered an additional Company contribution.

2. Apart from the ownership rights of the employees per se, the interests of the Plaintiffs in their trust assets had vested in varying degrees, mostly 100 percent, pursuant to the vesting provisions of the Plan itself. In this respect the McGraw-Edison Profit Sharing Plan might be said to have anticipated the Employees' Retirement Income Security Act which instituted the requirement of vesting in a retirement plan by way of protecting the interests of the employees.

3. The Profit Sharing Plan was qualified for Internal Revenue Service purposes and as such, under I.R.C. 401, when the Plan is terminated or contributions are discontinued, the interests of the employees become fully vested and nonforfeitable. See in this respect Goldberg, *Pension Plans and Executive Compensation,* 2.11-2.76; and Greenough and King, *Pension Plans and Public Policy,* ch. 7, "Public Policy—The Vesting of Pension Benefits".

4. When, in February, 1974, the Company found that a majority of the Union employees had accepted the Company's pension plan proposal, the Company terminated the Profit Sharing Plan, i.e. no further contributions were made into the trust, no more matching, etc. Article VIII of the Profit Sharing Trust Agreement, being a document implementing the Profit Sharing Plan, provides as follows:

Article VIII

Distribution on Termination

". . . . Upon termination of the Plan as respects any employer, the Trustee shall distribute to each participant employed by such employer his share in the Trust Fund in accordance with the terms of the plan, . . ."

The facts and documents in this case must have been a phantasmagoria to the District Court. Not only did it find the applicability and control of collective bargaining when it did not exist, the District Court ignored all of the above-enumerated occurrences of vesting, and then concluded that an amendment by the Company to the Profit Sharing Plan, made ten months after it had been terminated, en-

abled the Company to convert the trust assets back to its own treasury in return for—and undoubtedly to help fund —a fixed obligation to the trust beneficiaries.

The Courts have been wrestling with the problem of "personal" versus "union" interests in retirement funds or benefits for several decades. See for example, *Hauser vs. Farwell, Ozmun, Kirk, & Co.*, 299 F.Supp. 387 (1969), where the Court ruled that vesting had occurred and *Rothlein vs. Armour and Company*, 377 F.Supp. 506, 509, 513 (1974), where the Court ruled that it had not. The prevailing uncertainty brought about the instant suit which has engendered concurrent confusion and uncertainty among several thousand employees at the Power Systems Division of the McGraw-Edison Company with respect to their retirement benefits, as well as, the validity of their collective bargaining agreement (both 1974 and 1977 agreements) and the Company's financial situation.

Although the rights of the Plaintiffs in and to their retirement benefits had become personal to them for the several reasons stated, the "vesting" provided for in the McGraw-Edison Plan is now mandatory under ERISA. Thus, the issue of "personal" versus "union" rights and interests will undoubtedly arise with increased frequency and with unavoidable untoward effects upon the employees, the union and the company involved. It is important, therefore, that *Elgin J. & E. Railway Co. vs. Burley* be revisited, interpreted and applied if appropriate, to the issue of the vesting of retirement benefits.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WRAY G. ZELT III,
Attorney for Plaintiffs

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-81

VALENTINO BLANCHIN, et al.

vs.

McGRAW-EDISON COMPANY, a Corporation, and
Trustees of the McGraw-Edison Company
Profit-Sharing Trust

MEMORANDUM

In this action plaintiff-employees of the McGraw-Edison Company seek distribution of their interests under the McGraw-Edison Profit Sharing Plan, a contributory profit-sharing plan established by the defendant McGraw-Edison Company (the Company) and administered by the defendant Trustees of the McGraw-Edison Profit Sharing Trust (the Trustees). The parties have filed cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and have stipulated to various facts and written exhibits. Upon consideration of the applicable law, it is concluded that there are no material is-

sues of fact in dispute and that the case is appropriate for an entry of summary judgment.

Each participant's interest in the McGraw-Edison Profit Sharing Plan was represented by two trust accounts, a stock account, consisting of shares of the common stock of the Company purchased by the Trustees, and a general account, consisting of a proportionate share of the other assets held by the Trustees. It was expressly provided that shares of Company stock would be purchased by the Trustees whenever feasible.

Normal distribution of accounts was governed by sections 7 and 8 of the profit sharing plan. A participating employee would receive payment in full (the mode of payment, i.e., lump-sum cash, transfer of stock, purchase of annuity, etc., was left to the Trustees' discretion) upon death, disability retirement, or retirement at age 62. A participant employee who for any other reason left employment with the Company prior to attaining age 62 was entitled to the aggregate of his contributions plus interest and if he had been continuously employed by the Company for five years or more a scheduled percentage of the Company's contributions. Distribution would also occur, under article VIII of the trust, upon certain "terminations" of the profit sharing plan.

The Company retained the right to amend the profit sharing plan in section 10 and the trust in article VII, except that the Company could not receive any repayment from the trust and the moneys could only be spent for the benefit of employees. It was also a condition of the Company's right to amend that the value of each participant's account would be the same or greater than that to which he

would be entitled were he to terminate his employment on the date of amendment.

Plaintiffs, who number over 500 in this action,[1] were members of locals 4561, 3968 and 6449 of the United Steelworkers of America and were employed by the Power Systems Division, Canonsburg, Pennsylvania Plant, of the Company under collective bargaining agreements which provided that the terms of the profit sharing plan be extended to them. In October of 1973, the said collective bargaining agreements expired and the members of locals 4561, 3968 and 6449 went on strike. As a result of the ensuing collective bargaining, it was agreed, *inter alia,* that a fixed-benefit pension plan would replace the profit sharing plan. The collective bargaining agreement was ratified in February of 1974 by a majority of the members of locals 4561, 3968 and 6449.

The newly negotiated pension plan entitles employees or their beneficiaries to a fixed monthly payment in an amount determined by multiplying the employee's number of years of service by $8.00. Certain employees (including all of the plaintiffs) were also given the right to have their pension benefits calculated on the basis of an "adjusted profit sharing account" with respect to years of service accrued prior to February, 1974. It is undisputed that by reason of the valuation formula applied in crediting employees for their past services, the value of the various plaintiffs' pension rights was measurably greater as of the date of the 1974 agreement than the value of their account rights under the profit sharing plan. In return, all partici-

[1] Rule 23 of the Federal Rules of Criminal Procedure is not invoked, and class action certification is not sought.

pating employees were to be removed from the profit sharing plan, and the plan funds representing past employer contributions on behalf of these employees were to be used to provide the initial funding for the pension plan. The portion of employees' accounts attributable to their own contributions were to be held in trust separately for later distribution to them with interest. Additional funding for the new pension plan was to be provided by the Company as needed.

The profit sharing plan and trust agreements did not expressly reserve to the Company and the locals the right to modify terms through collective bargaining, nor did they provide for the transfer of profit sharing funds out of the trust. Nevertheless, pursuant to and shortly after the collective bargaining agreement of February 10, 1974, the Company ceased profit sharing contributions on behalf of members of locals 4561, 3968 and 6449. In December, 1974, the Company amended the profit sharing plan to formally remove the members of those locals from the profit sharing plan. The amendment also directed the trustees to segregate the trust funds allocatable to these employees' accounts, which the Trustees have done, pending disposition of this action.

The essence of the plaintiffs' complaint is that their right to the trust accounts under the profit sharing plan were vested and could not be affected by the 1974 collective bargaining agreement and ratification. Plaintiffs also contend that, their interests in the profit sharing plan and trust having been "terminated," a distribution of their relative interests is necessary. In response, both the Company and the Trustees contend that the plaintiffs are bound by

the 1974 collective bargaining agreement and that the profit sharing plan and trust were not "terminated."

Since the plaintiffs seek a remedy for contractual rights arising from a collective bargaining agreement, this court has subject-matter jurisdiction under §301 (a) of the Labor Management Relations Act of 1947.[2] *Smith v. Evening News Association,* 371 U.S. 195 (1962).

The plaintiffs rely heavily on the decision of the district court in *Hauser v. Farwell, Ozman, Kirk & Co.,* 299 F.Supp. 387 (D. Minn. 1969), in which former employees brought an action against the employer-company and their bargaining agent union contending that a plant close-down agreement entered into between the defendants unlawfully eliminated pension rights granted the plaintiffs by an earlier collective bargaining agreement. The pension rights in question were described in the original agreement as being *"fully vested* in each participant," *id.* at 390, and the court found accordingly that the rights were vested at the time the union attempted to bargain them away. Reasoning that "whereas a Union may bargain as to prospective matters such as seniority rights, future conditions of employment, etc., it cannot bargain away the accrued or vested rights of its members," the district court held that the former employees were to be restored to the pension rights which accrued under the original pension agreement. 299 F. Supp. at 393, 396, discussing *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. 711 (1945), adhered to, 327 U.S. 661 (1946).

[2] Section 301(a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

29 U.S.C. §185(a) (1970).

Unlike the agreement in Hauser, no rights under the profit sharing plan and trust in the instant case are described as "vested." On the contrary, the plaintiffs' rights thereunder were substantially limited by the broad power of amendment reserved to the company, including the company's right to eliminate all of the participant's interests save his right to that to which he would have been entitled had he resigned on the date of the amendment.[3] See, *e.g.,*

[3] Section 10 of the Profit Sharing Plan provides:

"The company may amend or discontinue the plan at any time upon written notice to the other employers, but no employer will benefit thereby, as provided in the trust agreement. Participants will be notified of any such amendment or discontinuance within a reasonable period of time thereafter."

The Trust Agreement provides in article VII-1:

"*Amendment.* This trust agreement and the plan may be amended from time to time by the company, except as follows:

"(a) The duties and liabilities of the trustees cannot be changed substantially without their consent;

"(b) Under no condition shall any such amendment result in the return or repayment to any employer of any portion of the trust fund or the income therefrom or result in the distribution of the trust fund for the benefit of anyone other than employees of the employers and their beneficiaries;

"(c) No such amendment shall reduce the value of a participant's share in the trust fund below an amount equal to the amount to which he would have been entitled if he had resigned from the service of all of the employers on the date of such amendment."

Jackson v. TransWorld Airlines, Inc., 457 F.2d 202 (2d Cir. 1972); *Genevese v. Martin-Marietta Corp.*, 312 F. Supp.1186 (E.D. Pa. 1969). Any other expectancies under the plan cannot be deemed "vested." The only profit-sharing plan which might be considered "vested" in the plaintiffs on February 10, 1974—the resignation *values* of their accounts—were unaffected by the collective bargaining agreement, which more than adequately preserved for each participant the entire *value* of his profit sharing account as of that date.

The provisions of the profit sharing plan having been extended to the plaintiffs in this case through prior collective bargaining, a transition from profit sharing to a fixed-benefit pension plan was an appropriate subject of collective bargaining in February of 1974. Indeed, 29 U.S.C. §158(a) (5) (1970), as applied in *Inland Steel Corp. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), compelled McGraw-Edison to negotiate on the subject once it was proposed by the unions. It was within the power of locals 4561, 3968 and 6449 and the Company to negotiate and determine the terms of the pension plan effected by the 1974 collective bargaining agreement, so long as those terms did not affect the vested rights of employees established by prior agreements. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 739 (1945). The subsequent amendment to the profit sharing plan adopted in accordance with the collective bargaining agreement was also within the authority reserved to the Company under the terms of the profit sharing plan itself. See Note 3 *supra*.

The plaintiffs, nevertheless, contend that they are entitled to a distribution under the terms of the profit sharing plan and trust, asserting that the Company by agreeing with

the locals to remove these bargaining unit employees from the profit sharing plan, caused a "termination" of the plan which triggered the following provision:

> "Upon termination of the plan as respects all employers, each participant's share of the trust fund shall be fully vested in him and shall be distributed to him in accordance with the terms of the plan. Upon termination of the plan as respects any employer, the trustees shall distribute to each participant employed by such employer his share in the trust fund in accordance with the terms of the plan. . . ." Trust Agreement art. VIII.

It is concluded, however, that any inconsistency between the terms of the profit sharing trust and the terms of the collective bargaining agreement of 1974, subsequently implemented by appropriate amendment to the profit sharing trust, must be resolved in favor of the collective bargaining agreement, the most recent specification of the rights and obligations of the parties concerned.

An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 75-81

VALENTINO BIANCHIN, et al.

vs.

McGRAW-EDISON COMPANY, a Corporation, and
TRUSTEES of the McGRAW-EDISON COMPANY
PROFIT-SHARING TRUST

ORDER

AND NOW, this 30th day of September, 1976, for the reasons stated in the foregoing Memorandum, the defendants' Motion for Summary Judgment be and the same is hereby granted.

IT IS ORDERED that judgment be and the same is hereby entered in favor of McGraw-Edison Company and Trustees of the McGraw-Edison Company Profit Sharing Trust, defendants, and against Valentino Bianchin, et al., plaintiffs.

(s) Herbert P. Sorg, *C.D.J.*

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APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2589

VALENTINO BIANCHIN, et al.

v.

McGRAW-EDISON CO., et al., TONY AQUILINO, et al.,

Appellants

On Appeal from the United States District Court
for the Western District of Penna.

C.A. No. 75-81

Argued September 9, 1977

Before:

VAN DUSEN, ADAMS and HUNTER, *Circuit Judges*

JUDGMENT ORDER

After consideration of the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and it is hereby affirmed.

Each side to bear its own costs.

By the Court,
(s) Arlin M. Adams
Circuit Judge

Attest:
(s) M. Elizabeth Ferguson
Chief Deputy Clerk

Dated: September 15, 1977

Certified as a true copy and issued in lieu
of a formal mandate on October 7, 1977.

Test: Thomas F. Quinn
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX "C"

Herb Abbondanza; Linn R. Adams; John A. Agostinelli; Samuel Ahwesh; Rino Altieri; Tony Aquilino; Nick Bardos; John Barrett; Ernest L. Beccari; Alfred Bernard; Raymond A. Bissiere; Louis Borrelli; Alfred J. Borza; James Boyan; Frank T. Bozek; Carl F. Bruno; Chester E. Cerbach; Frank J. Cessar; Michael Cherpak; Stephen Cherpak; John P. Chismody; Norman Crequt; Edward Cushman; Anthony W. Cwiklinski; Frank DeGennaro; Louis Donner; Lawrence C. Duessel; John Dupesko; Anthony D. Durkacs, Sr.; Pete Filius; Valentino Filosi; Donald J. Frank; Hugh S. Frantz; David Frye; Michael Gayarski; Ernest Gill; Joseph P. Gleba, Jr.; Lewis R. Greely; Mike Gwozda; Harold E. Hanna; James Hanna; Vincent W. Hartman; Charles Hatalsky; Robert W. Hayes; Joseph B. Hewitt; John W. Hood; Andrew J. Hornak; Carl F. Horvath; William Horwatt; William R. Hottel; Michael Hricak; Earl R. Jaudy; Philip Joseph; John Jurcic; Edward Kania; Walter J. Kania; Stephen J. Kazak; Elmer A. Kerekes; Frank A. Kern; Walter Kesneck; John W. Kiefer; Harry Kobert; Edwin H. Kochanski; Joe A. Koklich; Frank Kotyk; Nelson L. Kraeer; Sylvester J. Kubacki; Pete Kudack; John Dvak; Robert H. Lawther; Paul Lemanakis; Julius P. Lis; John P. Longo; Pete Luginski; Stanley F. Luginski; David C. Lutty, Sr.; George E. Malacky; Albert Marinelli; Andrew Martin, Jr.; Pete Matyuf; James F. McCloskey; Stanley E. Micinski; Joseph E. Miller; Guy W. Montgomery; Ernest R. Morris; Steve Morris; Frederick E. Motto; Henry Mullins; Frank Negle; J. Norvell; Grover

O'Bryan; James W. Opatt; Henry Ozelski; Samuel Paletta; Elmer I. Palmer; Joseph J. Patrick; William J. Pavcic; John Pawlish; Edward S. Popiolkowski; Carl Popovich; Louis P. Powell; Peter J. Powell; Bruno Prandini; John Ptak; Walter Raspet; Robert Rebonic; Wilbert M. Rettinger; William Rockovich; Ronald G. Rothka; Rudolph Rubis; Joseph S. Rybacki; Walter Rybacki; Robert J. Schreck; Daniel Sedora; Howard R. Smith; Patsy Smoke; James A. Sobrasky; Otis Spicer; Robert Spiller; Harry Spryshak; Roy Straessley; Ray Sutch; George Svitek; Gerald L. Svitek; William Sztukowski; George Teleski, Jr.; George Toth; Steve R. Toth; Stanley J. Twardy; Anthony Udodow; Steve Udodow; Ben Urso; Ronald L. Ward; Clair E. Watt; Joseph E. Wiencek; Edward F. Wozniak; Joseph M. Wozniak; Jean Woznichak; Walter Woznichak; Michael Wyck; John Yesenchak; Steve Zaken.